

Title 44
Chapter 9
Article 6

Telephone Solicitations

44-1271. Definitions

In this article, unless the context otherwise requires:

1. "Consumer" means a person who is solicited by a seller or solicitor.

2. "Licensed associated person of a securities, commodities or investments broker" means any associated person registered or licensed by the national association of securities dealers, a self-regulatory organization as defined in the securities exchange act of 1934 (15 United States Code section 78a through 78ll) or an official or agency of this state or of any other state of the United States.

3. "Licensed securities commodities or investments broker, dealer or investment advisor" means a person licensed or registered as a securities commodities or investments broker, dealer or investment advisor by the securities and exchange commission, the national association of securities dealers, a self-regulatory organization as defined in the securities exchange act of 1934 (15 United States Code section 78a through 78ll) or an official or agency of this state or of any other state of the United States.

4. "Manager" means a person who supervises the work of a solicitor.

5. "Merchandise" means objects, wares, goods, commodities, intangibles, real estate, securities or services.

6. "Person" means:

(a) A natural person or his legal representative.

(b) A partnership, a limited liability company, a limited liability

partnership or a domestic or foreign corporation.

(c) A company, trust, business entity or association.

(d) An agent, employee, salesman, partner, officer, director, member, stockholder, associate or trustee.

(e) Any other legal entity or any group associated in fact although not a legal entity.

7. "Premium" means any gift, bonus, prize, award or other incentive or inducement to purchase merchandise.

8. "Principal" means an owner, an officer of a corporation or limited liability company, a general partner of a partnership, a sole proprietor of a sole proprietorship, a partner of a limited liability partnership, a trustee of a trust and any other individual who controls, manages or supervises a telephone sales operation.

9. "Prize" means anything offered or purportedly offered and given or purportedly given to a person by chance. Chance exists if a person is guaranteed to receive an item and at the time of the offer or purported offer the seller or solicitor does not identify the specific item that the person will receive.

10. "Prize promotion" means a sweepstakes or other game of chance or an oral or written express or implied representation that a person has won, has been selected to receive or may be eligible to receive a prize or purported prize.

11. "Recovery service" means any business or other practice in which a person represents or implies that the person will recover or assist in recovering for a fee any amount of money that a consumer has provided to a seller pursuant to a telephone solicitation.

12. "Seller" means a person who, directly or through a solicitor, seeks orders for the sale of merchandise by means of telephone solicitation under any of the following circumstances:

(a) The person initiates contact by telephone with a consumer and represents or implies that:

(i) A consumer who buys merchandise will receive additional merchandise, the same as or different from the type of merchandise purchased, without any additional charge, except for actual postage or common carrier charges.

(ii) A consumer will receive or has a chance or opportunity to receive a premium.

(iii) The person is offering to sell the services of a recovery service.

(iv) The person is offering to make a loan, to arrange or assist in arranging a loan or to assist in providing information that may lead to obtaining a loan unless no payment of any kind is made until the loan proceeds are disbursed to the borrower.

(v) The consumer will receive a credit card if the consumer pays a fee for the card before receiving the card.

(b) The solicitation by telephone is made by the person in response to inquiries from a consumer generated by a notification or communication sent or delivered to the consumer that represents or implies that:

(i) The consumer has been specially selected in any manner to receive the notification or communication or the offer contained in the notification or communication.

(ii) The consumer will receive a premium if the consumer calls the person.

(iii) If the consumer purchases merchandise from the person, the

consumer will also receive additional or other merchandise, the same as or different from the type of merchandise purchased, without any additional charge or for a price that the person represents or implies is less than the regular price of the merchandise.

(iv) The person is offering for sale the services of a recovery service.

(v) The person is offering to make a loan, to arrange or assist in arranging a loan or to assist in providing information that may lead to obtaining a loan unless no payment of any kind is made until the loan proceeds are disbursed to the borrower.

(vi) The consumer will receive a credit card if the consumer pays a fee for the card before receiving the card.

(c) The solicitation by telephone is made by the person in response to inquiries generated by advertisements on behalf of the person that represent or imply that:

(i) The person is offering to sell the services of a recovery service.

(ii) The person is offering to make a loan, to arrange or assist in arranging a loan or to assist in providing information that may lead to obtaining a loan unless no payment of any kind is made until the loan proceeds are disbursed to the borrower.

(iii) The consumer will receive a credit card if the consumer pays a fee for the card before receiving the card.

13. "Solicitor" means a person who uses a telephone to seek sales of merchandise on behalf of a seller or uses a telephone to verify sales for a seller.

14. "Telephone solicitation sale" means a sale of merchandise by a seller.

44-1272. Telephone seller; registration

A. A seller shall file a verified registration statement with the secretary

of state before the seller solicits any consumer from a location in this state or any consumer located in this state. Each principal of the seller shall sign the registration statement, have the signature notarized and file the statement with the secretary of state along with the annual registration fee prescribed by section 44-1275. The registration statement expires on June 30 of each year and shall be annually renewed by completing a new registration statement within thirty days before expiration.

B. Except as provided in subsection D of this section, if, before the expiration of a seller's annual registration, there is a change in any of the information required by subsection C of this section, within ten days of the change the seller shall file a supplemental statement with the secretary of state, except that a seller shall only update quarterly any changes in solicitors hired by the seller.

C. Each registration statement shall contain all of the following information:

1. The true legal name of the seller.

2. The name under which the seller is doing business or intends to do business.

3. The seller's business form and state of organization.

4. If the seller is a corporation or limited liability company, a copy of its articles of incorporation and bylaws and amendments to the bylaws. If the seller is a partnership or limited liability partnership, a copy of the partnership agreement. If the seller is operating under a fictitious business name, the location where the fictitious name has been registered.

5. The complete street address of the physical location of the principal

place of business of the seller, the complete street address of all other locations from which the seller will be conducting business and all telephone numbers for telephones at these locations.

6. For each principal, manager and solicitor, the true legal name, residence address, telephone number and date of birth and a clear and legible copy of the current driver license or valid government issued photo identification card.

7. For each manager, the address of the business location for which the manager is responsible.

8. The name and address of the seller's agent in this state who is authorized to receive service of process in this state.

9. A copy of the bond filed with the state treasurer pursuant to section 44-1274.

10. Whether a principal or manager:

(a) Has been convicted or pleaded no contest to a felony or misdemeanor involving moral turpitude or a violation of this article.

(b) Has been held liable in a civil action, either by final judgment or by entry of a stipulated judgment, if the civil action alleged fraud, embezzlement, racketeering, fraudulent conversion or misappropriation of property or a violation of this article or the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property or the use of unfair, unlawful or deceptive business practices.

(c) Is subject to a currently effective injunction or restrictive order relating to a business activity as a result of an action brought by a public agency or department, including an action affecting a vocational license. The

statement shall include the name of the court, the date of the conviction, the judgment, order or injunction and, if applicable, the name of the governmental agency that filed the action resulting in the conviction, judgment, order or injunction.

11. A copy of any:

(a) Script, outline or presentation the seller will require or suggest that a solicitor use, except that if the seller does not require or suggest a script, outline or presentation, a statement that no such document is required or suggested.

(b) Sales information and literature provided by the seller to a solicitor or described by the seller for use by the solicitor, including scripts, outlines, presentations, information on how to conduct telephone sales, sample instructions, sample closings, product information and contest or premium award information.

(c) Sales information and any other literature provided by the seller to a consumer in connection with any solicitation.

D. If a seller expressly or impliedly represents to any consumer, directly or through a solicitor, that the consumer is or may be eligible to receive any premium, the seller shall submit with the registration statement another statement setting forth for each premium mentioned:

1. A description of the premium.
2. The value or worth of the premium and the basis for the valuation.
3. All terms and conditions a consumer must satisfy in order to receive the premium.
4. The odds of being able to receive the premium, and if the odds are not calculable in advance, the factors used in calculating the odds.

5. If the consumer will receive fewer than all of the premiums described by the seller:

(a) The manner in which the seller decides which premium the consumer will receive.

(b) The odds of being able to receive each premium, and if the odds are not calculable in advance, the factors used in calculating the odds.

(c) The name and address of each person who within the past twelve months has received the premium having the greatest value and the premium with the smallest odds of being received.

E. If the seller expressly or impliedly represents to any consumer, directly or through a solicitor, that the seller can or may be able to make a loan, arrange a loan, assist in arranging a loan or assist in providing information that may lead to obtaining a loan, the seller shall submit with the registration statement another statement setting forth:

1. For the previous twenty-four months, the names and addresses of any person who lent money to:

(a) Consumers who responded to the solicitations of the seller's predecessor or the seller's officers or owners or those persons having present management responsibilities or to companies with which they were associated.

(b) The seller's predecessor or the seller's officers or owners or those persons having present management responsibilities or to those companies with which they were associated for them to lend to consumers who responded to solicitations.

2. For the twelve months after the date of the registration, the names and addresses of all persons who informed the seller that they may be able

to lend money to consumers solicited by the seller or to the seller for the seller to lend to consumers who respond to the seller's representations that the seller can make a loan, arrange a loan, assist in arranging a loan or assist in providing information that can lead to obtaining a loan.

3. Copies of all contracts between the seller and lenders or prospective lenders who may lend money:

(a) To the seller to lend to consumers who, in conjunction with the seller's business, respond to the seller's representations that the seller can make a loan, arrange a loan, assist in arranging a loan or assist in providing information that can lead to obtaining a loan.

(b) Directly to consumers to whom the seller may represent that it can arrange or assist in providing information that can lead to obtaining a loan.

F. If any change is made to any script, outline, presentation, sales information or literature to be used by a seller during any solicitation, the seller shall submit the new or revised material before it is used.

G. Compliance with the registration and filing requirements of this article by a seller does not constitute an approval or endorsement by this state of the seller's registration documents or conduct.

44-1273. Exemptions

A. The following persons are not required to register and are exempt from this article:

1. A person acting within the scope of a license issued under title 6, 20 or 32 or by the corporation commission pursuant to this title, except this

paragraph shall not exempt persons licensed under title 6, chapter 13.

2. If soliciting within the scope of the license, any licensed securities, commodities or investments broker, dealer or investment advisor or any licensed associated person of a securities, commodities or investments broker, dealer or investment advisor.

3. An issuer or a subsidiary of an issuer that has a class of securities that is subject to section 12 of the securities exchange act of 1934 (15 United States Code section 78a through 78ll) and that is either registered or exempt from registration under paragraph (A), (B), (C), (E), (F), (G) or (H) or subsection (g) (2) of section 12 of the act. A subsidiary of an issuer that qualifies for exemption under this paragraph is not exempt unless at least sixty per cent of the voting power of the subsidiary's shares is owned by the qualifying issuer or issuers.

4. A person certificated or regulated by the corporation commission pursuant to title 40, chapter 2 or a subsidiary of that person or a federal communications commission licensed cellular telephone company or radio telecommunication services provider.

5. A person who is registered with the secretary of state pursuant to section 44-6552 or who is exempt from registration pursuant to section 44-6553.

6. A person making telephone solicitations for a newspaper of general circulation, magazine or a licensed or franchised cable television system.

7. An issuer or subsidiary of an issuer which is subject to registration under chapter 12, article 6 or 7 of this title or which is exempt from registration under section 44-1843, paragraph 1, 2, 3, 4, 5, 7 or 9.

8. A person making telephone solicitations for the sale or purchase of books, recordings, videocassettes and similar goods through a membership group or club regulated by the federal trade commission or through a contractual plan or arrangement such as a continuity plan, subscription arrangement, series arrangement or single purchase under which the seller ships goods to a consumer who has consented in advance to receive such goods and the recipient is given the opportunity to review goods for at least seven days and to receive a full refund for return of undamaged goods.

9. A person or solicitor for a person when soliciting previous customers, if all of the following apply:

(a) The person is not offering to sell or selling a security that is not registered with any state or federal authority.

(b) The person makes the solicitation under the same name as the name used to sell merchandise to the customer previously.

(c) The person does not operate a recovery service.

(d) The person does not conduct a prize promotion that requires or implies that to win a consumer must pay money or purchase merchandise.

(e) The person has not, or any of its principals have not, within twenty years been convicted in any state of a felony or crime of moral turpitude, breach of trust, fraud, theft, dishonesty or violation of telephone solicitation laws, been subject to a final judgment in a civil action involving fraud, deceit or misrepresentation or been subject to an administrative order involving fraud, deceit, misrepresentation or any violation of telephone solicitations laws of any agency of this state, another state,

the federal government, a territory of the United States or another country.

10. A person making telephone solicitations without the intent to complete and who does not complete the sales presentation during the telephone solicitation but completes the sales presentation at a later face-to-face meeting between the solicitor and the consumer provided that the later face-to-face meeting is not for the purpose of collecting the payment or delivering any item purchased.

11. A person who after making a telephone contact with a consumer sends the consumer descriptive literature and does not require payment before the consumer's review of the descriptive literature and the person is not conducting a solicitation involving any of the following:

(a) The sale of an investment or an opportunity for an investment that is not registered with any state or federal authority.

(b) A prize promotion or premium.

(c) A recovery service.

12. A person making telephone solicitations exclusively for the purpose of the sale of telephone answering services to be provided by that person or that person's employer.

13. Any bank holding company, bank, financial institution, trust company, savings and loan association, credit union, mortgage banker or broker, consumer lender or insurer, which is licensed or supervised by an official or agency of this state, any other state or the United States, including any parent, subsidiary or affiliate of these institutions.

14. A person or solicitor for a person who operates a retail business establishment under the same name as

the name used in the solicitation of sales by telephone, if on a continuing basis all of the following apply:

(a) Merchandise is displayed and offered for sale or services are offered for sale and provided at the person's business establishment.

(b) At least fifty per cent of the person's business involves the buyer obtaining the merchandise at the person's business establishment.

(c) The person holds a transaction privilege tax license pursuant to title 42, chapter 8.

15. A person providing telemarketing sales service continuously for at least five years under the same ownership and control that derives seventy-five per cent of its gross telemarketing sales revenues from contracts with persons exempted by this section. A seller using an exempt telemarketing sales service is not exempted unless otherwise qualifying for an exemption under this section.

16. A person or solicitor for a person soliciting another business if all of the following occur:

(a) At least fifty per cent of the person's dollar volume consists of repeat sales to existing businesses.

(b) The person does not conduct a prize promotion that requires or implies that to win a consumer must pay money or purchase merchandise.

(c) Neither the person nor any of the person's principals has within twenty years been convicted in any state of a felony or crime of moral turpitude, breach of trust, fraud, theft, dishonesty or violation of telephone solicitation laws, been subject to a final judgment in a civil action involving fraud, deceit or misrepresentation or been subject to an administrative order involving fraud, deceit, misrepresentation or any

violation of telephone solicitations laws of any agency of this state, another state, the federal government, a territory of the United States or another country.

17. A person or solicitor on behalf of a person who solicits sales by periodically publishing and delivering a catalog to consumers if all of the following apply:

(a) The catalog contains a written description or illustration of each item offered for sale and the price of each item offered for sale.

(b) The catalog includes the business address or home office address of the person.

(c) The catalog includes at least twenty-four pages of written material and illustrations.

(d) The catalog is distributed in more than one state and has an annual circulation by mail of at least two hundred fifty thousand.

B. In any civil proceeding alleging a violation of this article, the burden of proving an exemption or an exception from a definition is on the person claiming the exemption or exception. In any criminal proceeding in which a violation of this article is alleged, the burden of producing evidence to support a defense based on an exemption or an exception from a definition is on the person claiming the exemption or exception.

C. Any person or solicitor exempted from this article by this section shall not make or submit a charge to a consumer's credit card account or a consumer's checking, savings, share or similar account unless any of the following apply:

1. The person provides that the consumer may receive a full refund for the return of undamaged and unused goods or a cancellation of services by

providing notice to the person within seven days after the date that the consumer receives the merchandise and the person processes:

(a) A full refund within thirty days after the date that the person receives the returned merchandise from the consumer.

(b) A full refund within thirty days after the purchaser of services cancels an order for the services or a pro rata refund for any services not yet performed for the consumer.

2. The person provides the consumer with a signed copy of a written contract that includes the person's name, address and business telephone number and that fully describes the merchandise offered by the person, the total price to be charged by the person and any terms or conditions affecting the sale.

3. The person is an organization that is registered with the secretary of state pursuant to section 44-6552 or that is exempt from registration pursuant to section 44-6553.

44-1274. Bond; amount; filing; beneficiaries; cancellation

A. A seller shall maintain a bond of one hundred thousand dollars issued by a surety company duly authorized to do business in this state. The bond shall be filed with the state treasurer. No control or beneficiary interest may be held by the seller in the surety or by the surety company in the seller.

B. The bond required by subsection A of this section shall be in favor of this state to be held in trust by the state treasurer for the benefit of any consumer who suffers financial damage as a result of a violation of this article or an unlawful practice pursuant to section 44-1522.

C. A consumer who makes a claim against the bond may maintain an action against the seller and the surety, except that the surety is liable only for any monies paid by the consumer to the seller or solicitor, plus reasonable attorney fees. The surety bond may be sued upon in successive actions until the full amount is exhausted. A consumer may not commence suit on the bond more than four years after the act or omission on which the suit is based. Subject to the limitations in this article, a surety is liable for damages for an act or omission during the time the bond is in effect.

D. The aggregate liability of the surety to all consumers for all breaches of the conditions of the bond provided in this section shall not exceed the amount of the bond.

E. A surety for any cause may cancel the bond by giving sixty days' written notice by certified mail of the cancellation to the state treasurer, the attorney general and the seller. On or before the effective date of the cancellation of the bond, the seller shall either obtain a new bond which meets the requirements of this section and file a copy of the new bond with the state treasurer or make a cash deposit.

F. In lieu of furnishing the surety bond as required by this section, the seller may deposit with the state treasurer a cash deposit in the required amount.

G. The state treasurer shall maintain cash deposited pursuant to this section in an interest bearing trust account on behalf of the depositor. Deposits plus accrued interest may be withdrawn, if there are no outstanding claims against them, four years after the seller ceases to do business in this state. Deposits may be withdrawn four years

after the filing of a surety bond as a replacement to the cash deposit.

44-1275. Fees

A. The secretary of state shall set the annual fee for registration which shall not exceed five hundred dollars.

B. The secretary of state shall set the fee for each supplemental statement which shall not exceed twenty-five dollars.

44-1276. Required disclosures; payment for goods; identification of solicitor; cancellation of telephone solicitation sale; notice of right to cancel; definition

A. Before beginning the solicitation or sales presentation over the telephone, the solicitor shall disclose to the consumer:

1. The complete street address of the physical location from which the solicitor is making the telephone solicitation and the complete street address of the seller's principal location.

2. The legal name of the seller on whose behalf the solicitor is making the solicitation.

3. The solicitor's true legal name.

4. That the purpose of the call is to sell merchandise.

B. During any solicitation or sales presentation made by the solicitor and in any written correspondence provided to the consumer as part of the solicitation, the solicitor shall clearly and conspicuously disclose to the consumer:

1. Any charge, including the amount for the use of any premium being offered.

2. Any material restriction, requirement, condition, limitation or exception that is associated with the use of the premium.

3. Any charge connected with the sale of merchandise.

4. The time period within which any premium will be delivered.

5. The consumer's right to cancel the transaction pursuant to subsection C.

C. In addition to any right to otherwise revoke an offer, the consumer may cancel a telephone solicitation sale up to midnight of the third business day after the receipt of the merchandise or premium, whichever is later.

D. No telephone solicitation sale is effective unless the consumer is both:

1. Advised orally and in writing of the legal name, telephone number and complete street address of the physical location of the seller.

2. Advised orally of the right of cancellation along with a written notice containing the following information:

Notice of Cancellation

1. You may cancel this order without any penalty or obligation within three business days from the delivery of the merchandise or premium (gift, bonus, prize or award), whichever is later.

2. If you cancel, any payments made by you will be returned within ten days after the receipt by the seller of your notice of cancellation.

3. To cancel this transaction, mail or deliver a signed and dated copy of your cancellation notice or send a telegram to _____ at _____.

_____. (Name of seller) (Address of seller's place of business)

4. If you cancel, any merchandise or premium delivered to you must be returned at our expense to _____ at (Name of seller)

_____. (Address of seller's place of business)

no later than twenty-one business days after the receipt of this merchandise or premium, whichever is later.

E. The notice of cancellation given by the consumer is effective if it indicates the intention on the part of the consumer not to be bound by the telephone solicitation sale.

F. A provision of a contract, offer or agreement that waives a consumer's right of cancellation under this section is void and has no effect.

G. For the purposes of this section, "business day" does not include Sunday or a federal or state holiday.

44-1277. Violation; classification

A. Except as provided in section 44-1273, it is unlawful for a seller to engage in a telephone solicitation unless the seller is registered pursuant to section 44-1272.

B. A seller or solicitor engaged in a recovery service shall not charge or receive any money or other valuable consideration from a consumer before full and complete performance of the service that the seller or solicitor has agreed to perform for or on behalf of the consumer.

C. A seller or solicitor who violates this section is guilty of a class 5 felony.

44-1278. Unlawful practice; powers of attorney general; cumulative remedies

A. It is an unlawful practice pursuant to section 44-1522 for a seller to make or authorize to any consumer any reference to the seller's compliance with this article other than on inquiry by the consumer.

B. Failure to comply with this article is an unlawful practice pursuant

to section 44-1522. The attorney general may investigate and take appropriate action as prescribed by chapter 10, article 7 of this title.

C. The provisions of this article are in addition to all other causes of action, remedies and penalties available to this state.

D. The attorney general may bring an action in federal court in accordance with 15 United States Code sections 6101 through 6108.

44-1279. Civil remedies

A consumer may rescind a sale by an unregistered seller at any time. The consumer may recover any financial damages caused by the unregistered seller and reasonable attorney fees and costs.

44-1280. Subpoena; failure to supply information or obey subpoena; confidentiality of information; violation; classification

A. The county attorney or attorney general, in addition to other powers conferred on him by this article, may issue and serve in the manner provided under section 13-4072 a subpoena to a custodian of records of a public service corporation as defined by section 40-341 requesting:

1. The name and billing address for a subscriber.
2. The physical location of the service address assigned to a subscriber.
3. The long-distance service provider.
4. Subscriber credit information.

B. If a custodian of records of a public service corporation fails or refuses to fully comply with a subpoena issued under this section, the county attorney or attorney general may file a petition with the superior court and, after

notice and hearing on the petition, request the following orders until the custodian of records complies:

1. Adjudging the custodian of records or corporation in contempt of court.

2. Granting such other relief as the court deems proper.

3. Granting reasonable attorney fees to the state or county.

C. If the county attorney or attorney general determines that disclosure to the custodian of records of a public service corporation of the evidence relied on to establish reasonable cause would not be in the best interests of the investigation, he may request and the court may examine the evidence in camera and thereafter make its determination.

D. A person releasing information obtained pursuant to this section, except in the proper discharge of official duties, is guilty of a class 2 misdemeanor.

44-1281. Duties of secretary of state

The secretary of state shall:

1. Prescribe and publish the forms and adopt the rules necessary to carry out this article.

2. Refer to the attorney general or county attorney for investigation any matter which the secretary of state has reason to believe constitutes a violation of this article.

3. Preserve for five years from the date of filing all information required to be filed pursuant to this article, after which the information shall be destroyed. This information is public information and is open to public inspection.